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ABSTRACT

This report is divided into two parts. Part I discusses school roles, regulations, and disciplinary policies. An outline is presented of the development of the law concerning the authority of local boards of education, the reasonableness of specific rules and regulations, the exercise of suspension and expulsion, and the need for schools to adopt reasonable rules and disciplinary policies which will stand-up under court review. An attempt is also made to suggest alternate strategies for dealing with misbehaving and disruptive students to replace the ubiquitous use of suspension and expulsion. Topics covered include (1) the 'in loco parentis' doctrine; (2) regulation of children's activities; (3) freedom of speech; (4) the consitutional applications; (5) dress and appearance regulations; (6) marriage and pregnancy, and (7) the right to a hearing prior to suspension or expulsion. Part II deals with the juvenile court process. In view of the high percentage of juvenile delinquency charges based on school truancy, incorrigibility and misbehavior in school, the author believes that school personnel should be aware of significant procedural changes in the juvenile court procedure. (BW)

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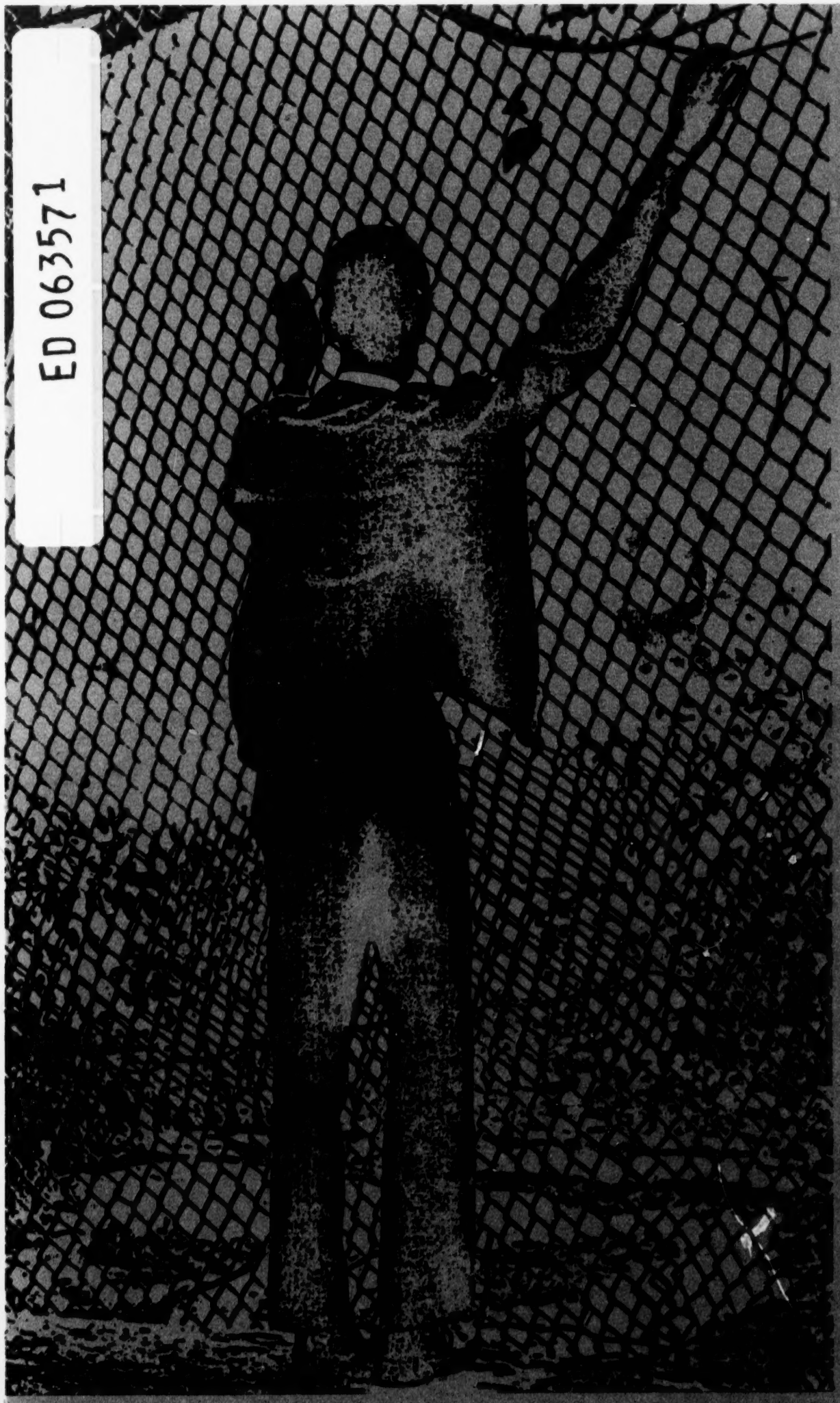

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The Legal Rights of Secondary School Children

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MONOGRAPH

THE LEGAL RIGHTS OF SECONDARY SCHOOL CHILDREN CHARGED WITH AN ACT OF DELINQUENCY OR VIOLATION OF SCHOOL LAWS

Handbook for School Personnel 1972

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Editor's Note

The ERIC/CAPS (Educational Resources Information Center/Counseling and Personnel Services) Center is in the process of developing detailed and interpretative materials which focus on the informational needs of helping professionals. *The Legal Rights of Secondary School Children* is one of these important resources. Its purpose is to assist counselors and other service oriented professionals to fully understand the court system as it relates to juvenile offenders and to create awareness of legal rights and protective measures available to secondary school students.

The author of this monograph is Paul Piersma, Associate Director of the National Juvenile Law Center in St. Louis. Mr. Piersma is a University of Michigan Law School graduate whose range of experiences include a private practice and service as a probation officer and referee for the Washtenaw County Probate Court where he conducted approximately 3,000 hearings in delinquent and neglect cases. As an associate director of the National Juvenile Law Center he plans and implements training sessions and materials on juvenile court law and procedure for legal services attorneys, assists in the training of juvenile court personnel, and participates in efforts to urge local boards of education to restructure the secondary school disciplinary process.

This monograph, based on his experience and research takes you through the legal precedents and actual cases which have led to revisions in the treatment of juvenile cases. It articulates problem areas--in the courts, the schools, the detention centers--and suggests ways in which counselors, teachers and other school personnel may deal with truant, incorrigible or otherwise problematic children. It also features a highly applicable bill of student rights by attorney Ralph Faust, Jr.; also of the National Juvenile Law Center. This bill of rights can help schools implement policies which will afford students more consistent treatment for offensive behavior. A comprehensive listing of legal precedents, books, journal articles and special reports relevant to the topic of secondary school students' rights is also included.

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This monograph represents the personal work of the author; the opinions expressed herein are those of the author and should not be construed as representing the opinions or policy of any agency of the United States government or of the National Juvenile Law Center.

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Preface

The phrase "student rights" evokes a variety of emotional reactions. Reaction to "student rights" is due in part to the use of the phrase by student advocates as a rallying cry in harranging the establishment. Many school administrators, teachers, policemen, and probation officers would like to restate the concern. Student rights? What about teachers' rights? Or rights of policemen? Should not school administrators have the right to deal properly with disruptive students? The point is that the issue of student rights seems to be getting all of the attention while other important concerns are overlooked. For example, a critical concern should be the search for innovative strategies in dealing with truant, failing, misbehaving, disruptive, and law-breaking students. Certainly, the argument can be made that giving additional rights to children will not solve the problems of juvenile delinquency and will not necessarily improve the quality of the educational process.

However, the Supreme Court of the United States has made it clear that the local school boards and school administrators cannot continue to regulate student behavior with virtually unchecked authority. The question is not whether students have a right to challenge unreasonable rules and insist on due process of law. Instead, the question is the manner in which the school disciplinary processes will be restructured to meet emerging legal principles.

If they wish, school boards and school administrators can ignore the issues, worry them to death, waste their energies in reacting, and wait for lawsuits.

Or, instead of waiting for lawsuits, school personnel can go to work in assuming the task of restructuring the disciplinary process. The methods of approaching the task are legion. However, the effort will be a waste of time unless the complexity of the task is appreciated and the efforts of other school systems are thoroughly examined. First, an attempt must be made to ascertain the criteria employed by the courts in reviewing school rules and disciplinary procedures. At the same time, model codes and codes recently adopted by other school systems should be reviewed. Next, legal counsel should be employed to participate

in the arduous process of drafting rules and disciplinary policies which will stand up under court review.

Aside from procedural questions, a critically important aspect of any serious effort to review the disciplinary process is the search for strategies to develop an atmosphere more conducive to learning in the schools. An attempt should be made to develop programs which enhance the possibility that the truant, failing, and misbehaving student will have some successes in school. Efforts should also be directed toward coordination of educational projects and elimination of overlapping and competing projects sponsored by a variety of community agencies.

A critical area of concern closely related to the restructuring of disciplinary policies in the schools is the common practice of referring truant, incorrigible, and misbehaving children to the juvenile court. Research findings indicate that delinquency and lack of success in school are closely related and that a high percentage of the referrals to the juvenile courts are based on school truancy, incorrigibility, and misbehavior in school. The concern for school personnel is that the juvenile court process is undergoing marked procedural changes in the wake of recent landmark decisions of the U.S. Supreme Court.

School personnel must now reeducate themselves concerning juvenile court procedure. What are the criteria employed by court staff in processing referrals to the court? What information is required from the schools when a child is charged with truancy or misbehavior in school? What new procedures have replaced informal probation? How can school personnel best communicate with the court intake officer?

Aside from concerns in processing referrals to the juvenile courts, school personnel should be aware of serious criticisms of the juvenile courts system. Are these criticisms valid? If so, what efforts can be made by school personnel to improve the juvenile justice system?

Citations: The form of citation used by most law journals is employed throughout this mongraph for the reason that most of the works cited are law materials and that if another form of citation were

used, the non-lawyer reader may have found the citations less confusing but the retrieval of the works cited much more difficult. The form of citation followed is the Uniform System of Citation published by the Harvard Law Review Association. A brief explanation:

387 U.S. 1, 16 (1967) - refers to a decision of the United States Supreme Court as officially published by the Court (footnote 11)

387	U.S.	1	16	1967
Volume no.	Court	page opinion begins	page of quoted matter	date

363 F.2d 749 (5th Cir. 1966) - refers to a decision of one of the thirteen Federal Circuit Courts of Appeal. The decision would amount to the law of that Circuit and may or may not be followed by the other Circuits. If appealed, the decision could be affirmed or reversed by the U.S. Supreme Court (footnote 26)

184 F. Supp. 388 (E.D. So. Car. 1960) - refers to a decision of the federal trial court, the U.S. District Court for the Eastern District of South Carolina (footnote 5)

272 N.C. 147, 158 S.E.2d 37 (1967), Cert. denied, 390 U.S. 1028 (1968) - refers to a decision of the Supreme Court of North Carolina which is reported in the official state reporter and a regional reporter, "S.E." which collects Supreme Court decisions from several states. "Cert. denied" indicates that the U.S. Supreme Court has refused to consider the case and the decision of the Supreme Court of North Carolina stands. (footnote 25)

PART I: SCHOOL RULES, REGULATIONS, AND DISCIPLINARY POLICIES

Introduction

The secondary schools of many communities are faced with the substantial and growing problem of truant and misbehaving children. Furthermore, the young have begun to realize the effectiveness of acting in concert. Sit-ins, boycotts, and mass demonstrations are occurring more frequently in secondary schools. Students are becoming conscious of the potential of "student power" and are beginning to assert the right of dress and grooming, and the right to due process of law. This trend is given impetus by the availability of materials advocating the assertion of legal rights by the young.[1] Students are rejecting the idea that they should wait until attaining majority before gaining their rights.

Although the law on the subject is inconsistent and not well developed, litigation between students and schools is increasing, and a significant body of court rulings favoring student rights is developing. Despite the growing body of court rulings favoring student rights, school personnel know very little about the emerging theories of law and have made little effort to revamp the disciplinary process to anticipate court tests which are becoming increasingly more probable. Furthermore, school administrators rely excessively on suspension, expulsion and referral to juvenile court in dealing with misbehaving and disruptive students.

The following discussion outlines the development of the law concerning the authority of local boards of education, the reasonableness of specific rules and regulations, the exercise of suspension and expulsion, and the need for schools to adopt reasonable rules and disciplinary policies which will stand up under court review.

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[1] See, e.g. Strouse, *Up Against the Law* (1970) (Signet-paperback 95¢); Anonymous, *The Bust Book* (distributed by the New York Regional S.D.S. and other groups located in New York City); Student Rights Project, New York Civil Liberties Union, *Student Rights Handbook* for New York City, Faust et al., *Student Rights Handbook* for Dayton, Ohio, 1971 (published by the National Juvenile Law Center, St. Louis, Mo., and Center for the Study of Student Citizenship, Rights and Responsibilities, Dayton, Ohio).

An attempt is also made to suggest possible strategies in dealing with misbehaving and disruptive students as alternatives to the ubiquitous use of suspension and expulsion.

Board of Education Authority

Subject to the powers granted to the federal government, sovereign governmental power resides in the state, not in any of its political divisions. The legislatures of each state have provided for the education of children and have delegated certain powers to regulate public education to the local school boards. The local board has power over student conduct which is related to its function of educating children. These powers are generally very broad. For example, the Michigan statute provides:

> The board may authorize or order the suspension or expulsion from school of any pupil guilty of gross misdemeanor or persistent disobedience, or one having habits or bodily conditions detrimental to the school, whenever in its judgment the interests of the school may demand it...[2]

The local school board must, in the first instance, determine the limits of its power. However, when called upon, the courts make the final determination of school board authority. Under our system of government, the courts serve as checks on the exercise of executive power.

For a number of years, courts have had a "hands-off" policy with respect to school board regulation. As a general rule the courts have upheld school regulations unless they are arbitrary or unreasonable and until recently, the courts have generally deferred to the judgment of school administrators and boards of education in determining whether a particular school regulation is reasonable.

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[2]M.S.A. 15.3613.

[3]See e.g., Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923), the Supreme Court of Arkansas upheld the right of a school principal to refuse admission to a girl because of a school regulation prohibiting the use of talcum powder. The court said: "The wearing of transparent hosiery, low-necked dresses, or any style of clothes tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited."

Rules and Regulations Upheld by the Courts - Early Cases

School regulations prohibiting the use of talcum powder,[3] slacks, short skirts, and membership in fraternities, sororities, and secret societies[4] have been upheld as reasonable. Courts have also upheld school regulations of student parking, noon hour activities, and the participation by married students in extra-curricular activities. The suspension and expulsion of secondary school students for a wide range of allegedly disruptive activities have been upheld by the courts, including: possession of obscene materials, smoking, wearing inflammatory buttons, tearing the American flag, wearing long hair, wearing metal cleats on shoes, and the boycott of the school food service.[5]

In taking a "hands-off" policy in upholding school administrative actions, the courts have reasoned that the regulation in question may prevent disruption of the educational process. In a Massachusetts case, the court upheld suspension of a student for failure to comply with the board's rule concerning the proper length of hair on the grounds that:

> [T]he unusual hairstyle of the plaintiff could disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress. Thus, as with any unusual, immodest or exaggerated mode of dress, conspicuous departures from the accepted customs on the matter of haircuts could result in the distraction of other students.[6]

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[4]See, e.g., Waugh v. Board of Trustees, 237 U.S. 589 (1915), the Supreme Court of the United States held that a state college has the right to restrict affiliations with fraternities and sororities; Wilson v. Abilene Independent School District, 190 S.W. 2d 406 (Tex. Civ. App. 1945) upheld the action of a school in prohibiting students from becoming members of high school fraternities and sororities.

[5]See, e.g., Byrd v. Gary, 184 F. Supp. 388 (E.D. So. Car. 1960) (suspension for organizing boycott of food service); Stromberg v. French 60 N.D. 750, 236 N.W. 477 (1937) (suspension for wearing metal heel plates).

[6]Leonard v. School Committee, 349 Mass. 704, 709-710, 212 N.E.2d 468 (1965).

In declining to make an independent determination of the existence or non-existence of such a reasonable likelihood of disruption or harm to the educational process, the courts have typically said:

> [T]he superintendent, a principal and board of trustees of the public free school, to a limited extent at least, stand, as to the students attending the school, in loco parentis, and they may exercise such powers of control, restraint, and correction....as are necessary to enable teachers to perform their duties and to effect the general purposes of education. The courts will not interfere in such matters unless a clear abuse of power and discretion is made to appear.[7]

In Loco Parentis Doctrine

The *in loco parentis* theory was relied on extensively by the courts in the early cases reviewing school administrative action. As a logical application of this theory, the court held that the schools have no power over a student once he leaves the school grounds.[8] However, certain exceptions to this "in school/out of school" distinction were recognized. An early case drew an exception to the rule for outside activity that "has a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination."[9] In that case, a student had been overheard referring to his teacher as "Old Jack Seaver" while walking past his teacher's home with a group of students after school. The teacher whipped the student and the student brought an action for assault and battery. In the course of the opinion, the court upheld a jury charge that corporal punishment was permissible under the circumstances.

Most recent decisions reviewing the validity of school rules concerning student conduct have not dealt extensively with the *in loco parentis* doctrine. Instead, the courts have been paying increased attention to the alleged disruption, distraction, and commotion of the school system which the school rule in question is designed to prevent or remedy.

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[7]Wilson v. Abilene Independent School District, 190 S.W.2d 406, 410 (Tex. Civ. App. 1945).

[8]See, e.g., Dritt v. Snodgrass, 66 Mo. 286 (1877).

[9]Lander v. Seaver, 32 Vt. 114, 120 (1859)

Furthermore, the *in loco parentis* doctrine is an extension of the concept of *parens patriae*--the state taking over the duties of a parent in certain circumstances. In a recent decision of the United States Supreme Court, this doctrine has been rejected: the concept of *parens patriae* has "proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme... but its meaning is murky and its historic credentials are of dubious relevance."[10]

Regulation of Children's Activities

Another basis for upholding secondary school regulations is that the state's authority over children's acitivities has been more extensive than the regulation of the activity of adults. The employment of children is regulated more rigorously than the regulation of adult employment. All states regulate the employment of children for the purpose of excluding children from hazardous occupations and disease, and to limit the amount of work a child can do without endangering his health.

Furthermore, censorship of materials viewed by the young has been given more constitutional scope than censorship of materials viewed by adults.[11]

The Supreme Court of the United States has held that concern for a child's welfare may justify limitations on fundamental American freedoms. In *Prince v. Massachusetts*[12] the Court upheld the conviction of the guardian of a girl who sold magazines on the street in violation of an ordinance prohibiting parents and guardians from allowing their children to sell magazines on the street. The girl had been selling religious literature and her guardian defended the suit against her on the grounds of freedom of religion. In the course of the opinion, the

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[10]In re Gault, 387 U.S. 1, 16 (1967).

[11]See, e.g., State v. Settle, 90 R.I. 195, 156 A.2d 921 (1959) and Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

[12]321 U.S. 158 (1944).

Court conceded that such legislation would be invalid if applied to sales by adults, but stated:

> [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare...[13] The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and matters of employment.[14]

However, in the absence of a clear need for special protection, constitutional protections are available to children as well as to adults. Decisions of the United States Supreme Court have ended compulsory participation in school flag ceremonies[15] and the reading of the Bible and prayers[16] for the reason that such activities violate the free exercise of religion and freedom of speech clauses of the U.S. Constitution. The Supreme Court also struck down a statute prohibiting the teaching of evolution as a violation of the establishment of religion clause of the Constitution.[17]

Recently the Supreme Court has determined that secondary school students have a certain constitutional right to express themselves in the classroom and on the school grounds.

The Constitution Applied to the Secondary Schools - The Tinker Case[18]

Several children planned to wear black armbands to school to protest American involvement in Vietnam. School authorities learned of the plan and enacted a regulation that prohibited the wearing of armbands on school property. Despite the new regulation, the children wore black armbands to school and were suspended by school authorities. Court Action was instituted to enjoin the school authorities from carrying out the suspensions.

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[13] Id. at 167.

[14] Id. at 168.

[15] State Board of Education v. Barnette, 319 U.S. 624 (1943).

[16] Abington School District v. Schempp, 374 U.S. 203 (1963) (Bible reading); Engel v Vitate, 370 U.S. 421 (1962) (prayers).

[17] Epperson v. Arkansas, 393 U.S. 97 (1968).

[18] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

The case was eventually appealed to the United States Supreme Court, which held for the first time, that the constitutional guarantee of free speech limits the power of school officials to prohibit student political protest in the secondary schools. The Court conceded that the symbolic act of wearing armbands was "speech" and held that the students' "silent, passive expression of opinion" was an exercise of "primary First Amendment rights"[19] which could be prohibited only upon showing that such conduct "would materially and substantially interfere with requirements of appropriate discipline in the operation of the school."[20] The Court did not agree with the decisions of the lower courts which deferred to the discretion and expertise of school officials in finding a reasonable basis for the adoption of the armband regulation. The court also rejected a requirement found in earlier cases that the plaintiff show that the school regulation in question was motivated by other than legitimate school concerns. Instead, the Court shifted the burden to the school system. Abridgement of free expression of secondary school students is prohibited unless that expression materially and substantially interferes with the operation of the school.[21]

This case is certainly not the last to deal with the question of the extent of the right of student expression in the secondary schools. It should be noted that the protest in this case was "unaccompanied by any disorder or disturbance on the part of petitioners," and did not concern "speech or action that intrudes upon the work of the schools or the rights of other students."[22]

Freedom of Speech

To express opposition to school policies or to the war in Vietnam, students use a variety of tactics, ranging from editorials in the student

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[19] Id. at 508

[20] Id. at 509

[21] Id.

[22] Id. at 508

paper to sit-ins. When this expression takes the form of a written editorial or speech the courts will be likely to follow the *Tinker* ruling. However, there is no Constitutional right to express dissent at any place or at any time. "The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[23] For example, peaceful picketing has generally been accorded constitutional protection, but the courts have held that the right to picket may be restricted under certain circumstances.[24]

Furthermore, certain expression arguably similar to the wearing of armbands may not be viewed by the courts as "speech" within the meaning of the First Amendment. In a case similar to but preceeding *Tinker*, the U.S. Court of Appeals for the Fifth Circuit upheld the suspension of students for wearing freedom buttons to school where the record indicated that the wearing of the buttons had caused disruption in the school.[25]

However, it is now clear that student expression must pose a substantial threat to the educational process before such expression may be curtailed. If expression substantially threatens to interfere with the educational process, such censorship by the school administration may be invoked.[26]

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[23] Id. at 507

[24] See, e.g., State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028 (1968), a march by adult pickets soley for the purpose of attracting attention of students and teachers was held a violation of a statute prohibiting willful disturbance of the public school, even though the defendants had walked silently, and had not been on school grounds and had provoked no violence.

[25] See, Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966); however, in a companion case the court found the regulation forbidding the wearing of freedom buttons as arbitrary and unreasonable since the court found that there was no evidence of the disruption of school acitvities. See, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[26] See, e.g., Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195 (6th Cir. 1969), the court upheld the suspension of a student who had distributed a leaflet urging other students to rebel against the school administration.

Dress and Appearance Regulations

The last few years have seen a spate of litigation challenging school dress and grooming regulations. In particular, the increasing popularity of longer male hair styles has met a corresponding increase in the number of suits contesting the authority of the school to impose particular standards of appearance on students. Although the controversy over hair has sometimes had the appearance of a tempest in a teapot, most courts have dealt with the fundamental issue involved--"the extent to which the Constitution protects such uniquely personal aspects of one's life as the length of his hair."[27]

The Supreme Court of the United States has not recently dealt with dress and appearance regulations. However, state supreme courts and lower federal courts have applied the reasoning of the *Tinker* decision in recent cases and have declined to defer entirely to the judgment of school administrators as to whether or not the regulation in question is necessary to meet a reasonable likelihood of disruption to the educational process. The courts are demanding proof of actual disruption to the educational system.

In those cases in which the courts have upheld the validity of hair regulations, the facts have generally shown that long hair did in fact cause distraction and disruption to the educational process. In *Ferrell v. Dallas Independent School District*[28] three male high school students, members of a rock group, were denied admission at the beginning of the school year because of their "Beatle" hair style. The testimony established that there had been instances of fighting, harassment, and obscene language as a result of their wearing long hair in school. In view of the disruptions, the court held that the rule banning long hair was neither unreasonable nor unconstitutional.

In the absence of a showing of substantial disruption, however, the courts are not likely to uphold arbitrary dress and grooming rules which bear no reasonable relationship to the educational process.

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[27]Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970).

[28]392 F.2d 697 (5th Cir. 1968), cert. denied 393 U.S. 856 (1968).

Although the courts are not in agreement concerning the precise constitutional theories involved, "most courts have either held or assumed that one's choice of hair style is constitutionally protected and that the state may invade this interest only upon a showing of compelling reason, i.e., that the forbidden style, if allowed, would be a material and substantial interference to the educational system."[29]

The Constitutional theories advanced in support of the student's freedom to choose his appearance include the arguments that long hair is a form of expression protected by the First Amendment, that the student's individual choice of his appearance is a fundamental right protected by the due process clause of the Fourteenth Amendment, and that exclusion of students from school simply on the basis of hair length violates the Constitutional prohibition against the denial of equal protection of law.

Whatever the Constitutional theory, the courts generally hold that school officials must demonstrate that long hair actually has resulted in disruptions of the educational process sufficient to justify restraint on individual freedom to choose one's appearance.

In the cases in which school officials have merely argued that the appearance rule is necessary for "discipline" and have offered no evidence to establish a reasonable connection with the health, safety, or education of students, the courts have usually not sustained such regulations. In *Karr* v. *Schmidt*, a case involving the exclusion from school of a sixteen year old student with collar-length hair, the absence of evidence of any problems caused by long hair led the court to conclude:

> ....the presence and enforcement of the hair-cut rule causes far moredisruption of the classroom instructional process than the hair it seeks to prohibit....The style in which a male high school student wears his hair has such a tenuous and speculative relationship to any material or substantial distraction or disruption of the educational or instructional process as to render any rule regarding length of hair based upon such a relationship, if any, unreasonable.[30]

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[29]Karr v. Schmidt, 320 F. Supp. 728, 731 (W.D. Tex. 1970); stay of injunction denied, 91 S. Ct. 592 (1971).

[30]Id. at 733.

Although the majority of cases contesting dress and grooming regulations have involved male students, the length of female hair has not been immune from regulation in some school systems. In *Sims* v. *Colfax Community School District*,[31] a girl successfully challenged her suspension from school for failure to comply with a rule that provided that hair must be kept one finger width above the eyebrow. Having found absolutely no showing of any interference with the educational process caused by the girl's hair style, the court held that the rule unreasonably circumscribed the student's Constitutional right to a free choice of her appearance.

Marriage and Pregnancy

In dealing with school regulations on student marriage and pregnancy, the courts have been inconsistent. Generally, the courts have not upheld school regulations permanently excluding a student from school soley on the basis of marriage.[32] However, some courts have held that the exclusion of married students is not unreasonable or arbitrary.[33]

Rules excluding married students from extra-curricular activities[34] and regulations requiring pregnant students to withdraw from school have been upheld. In a 1961 Ohio case,[35] the court said that a pregnant girl's attendance was denied in the interests of her physical well-being and not as a punitive measure. The court said that after the birth of the child, she could return to school.

The marriage and pregnancy regulations appear to be intended to prevent married and pregnant students from communicating their

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[31] 307 F. Supp. 485 (S.D. Iowa 1970).

[32] See, e.g., Nutt v. Board of Education of Goodland, 128 Kan. 507 (1929).

[33] Thompson v. Marion County Board of Education, 202 Tenn. 29, 302 S.W.2d 57 (1957), the court said that during the first few months after marriage the student could have a disruptive effect on other students.

[34] See, e.g., Board of Directors of the Independent School District of Waterloo v. Green, 147 N.W.2d 854, 860 (1967).

[35] State v. Chamberlain, 29 Ohio Op.2d 262, 175 N.E.2d 539 (1961).

potentially different moral attitudes to the unmarried students. This premise has been successfully challenged in recent litigation.[36] Currently, litigation concerning the rights of married and pregnant students is not as frequent as litigation concerning such issues as speech and dress. However, regulations concerning the attendance and activities of married and pregnant students may be held invalid if tested in the courts in view of the necessity of the school officials to show that regulations are necessary to maintain orderly discipline in the school process.

The Right to a Hearing Prior to Suspension or Expulsion

In response to the severity of expulsion and lengthy suspension, the courts have established the general rule that a child may not be expelled summarily or given a lengthy suspension for misconduct unless notice of the charges against him has been given and some type of hearing is afforded him. Beginning with the case of *Dixon* v. *Alabama*[37] in 1961, most of the cases have dealt with expulsion from state supported colleges and universities. *Dixon* held that the notice to the student must contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the board. In addition the student must have an opportunity to present his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. He must also be given the names of the witnesses against him and a report on the facts to which each witness testifies. Finally, if the hearing is not directly before the board, the findings are to be presented in a report to the student.[38] However, the court indicated that a full-dress hearing with full rights of cross-examination is not required.

The courts have also recognized the right of the secondary school student to be heard prior to expulsion or lengthy suspension from

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[36] See, e.g., Anderson v. Canyon Independent School District, 412 S.W.2d 387 (Tex. Civ. App. 1967)

[37] 294 F.2d 150 (5th Cir. 1961).

[38] *Id.* at 158-159.

school[39] in view of the recent U.S. Supreme Court decision which unequivocally established that the "juvenile" has the same right to due process of law as an adult: "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[40]

Consider the following case in which litigation initiated by a student was settled before trial.[41] The school administrator had attempted, without notice or prior hearing, to transfer the student to another high school as a disciplinary measure for alleged possession of narcotics. The Federal District Court issued a temporary restraining order enjoining the school from transferring the student without reasonable notice and an opportunity to be heard. Subsequently, the law suit was settled by an order (by agreement of the parties) providing for notice and a hearing (without a multitude of technical trappings) in all future disciplinary transfers within the school district. The order provided in part that:

> All hearings before the Superintendent of the Albany Unified School District or his designee in such disciplinary transfer actions should be conducted as follows:
>
> (a) the student may, if he chooses, be accompanied and represented by his parents or guardians at such hearing;
>
> (b) the student, prior to such hearing, shall be given an opportunity to inspect all written evidence, reports and records upon which the School District may rely;
>
> (c) the student shall have the right to testify in his own behalf, to call and examine witnesses, to introduce evidence, to confront and cross-examine witnesses testifying adversely to him and to submit rebuttal evidence;

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[39]Diggs v. Board of Education of the City of Camden (N.J. Dept. of Educ., May 11, 1970).

[40]In re Gault, 387 U.S. 1, 13 (1967).

[41]Cardwell v. Albany Unified School District (unpublished case #C-70 1893 U.S. D.C. N. Cal. 1970).

(d) the student shall have the right, at his own expense, to record or transcribe the proceedings;

(e) the Superintendent shall not be required to observe the rules of evidence observed by courts, but evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs; and

(f) the decision of the Superintendent shall be in writing and shall be based solely upon substantial evidence presented at the hearing. Such decision shall be supported by written findings and conclusions and a copy of such decision shall be made available to the student and his parents or guardians.[42]

Consider, also, the recent restatement of suspension policies by the New York Board of Education[43] setting forth several specific requirements to be followed prior to suspension: (1) a "finding" that the accused student's continued attendance in the classroom will prevent the orderly operation of the class or other school activities must precede the superintendent's suspension hearing which finding must include documentation of all remedial supportive procedures enlisted, and verification that "every effort has been made" through the relevant community and administrative sources in planning "educationally for the benefit of the student;" (2) no student may be suspended for more than five days unless a full hearing shall have been held; and (3) a fair and impartial hearing must be provided, including "immediate notice via telephone or telegram followed by certified mail," notice of the right to counsel, statement of charges with appropriate factual time and date documentation, and notice of possible disposition following the hearing.

The foregoing examples illustrate the variety of specific procedural requirements which may be adopted by a board of education or be ordered by a reviewing court. However, in view of the fact that neither the U.S. Supreme Court nor the U.S. Courts of Appeal

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[42] Id.

[43] In the Matter of Costelli (N.Y. Bd. of Educ., May 28, 1970)

have determined the specific procedural rights available to the student, many controversial questions regarding procedural rights remain unanswered. It is generally conceded that a full trial need not be provided.[44] Probably the most controversial question which has been dealt with by a few lower courts and certain boards of education is whether the child has a right to counsel at the hearing.

In view of the uncertainty in this area of the law, all that can be said at this time is that the child is entitled to a fair hearing which preserves the rudiments of an adversary proceeding and provides him an opportunity to be heard.

Implications for School Personnel

In the 1950's the U.S. Supreme Court recognized the value of education when it observed that "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[45] Certainly, the expulsion or suspension of a student runs counter to the norm of a universal public education. It is understandable that the courts are now beginning to require that school board action be based on a showing of clear and imminent danger to the educational process rather than a mere suspicion of possible disruption.

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[46]

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[44] See, e.g., Madera v. Board of Education, 386 F.2d 778 (2nd Cir. 1967), cert. denied, 390 U.S. 1028 (1968).

[45] Brown v. Board of Education, 347 U.S. 493 (1954).

[46] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969).

Practical application of this broad principle is uncertain at the present time. The *Tinker* decision makes clear only that the school system must tolerate expression which is not disruptive or distracting. The questions with which the courts will continue to wrestle are: (1) what level of distraction and disorder which normally flows from the expression of controversial ideas must be tolerated by the school system?; (2) what forms of dress, grooming, and action constitute "symbolic expression" entitled to protection as the exercise of speech?; (3) to what extent will the courts determine the existence or non-existence of the reasonable likelihood of disruption to the educational process in reviewing local school board actions?; and (4) what specific procedural safeguards must be made available to a student prior to suspension or expulsion?

Litigation against the schools initiated by students is becoming increasingly more probable. Secondary school students, armed with sophisticated handbooks[47] and a legal services attorney a telephone call away, appear to have learned their lessons well from their older siblings. In view of the recent national rash of sit-ins, picketing, student demonstrations, and challenges to school rules, it is only a matter of time before the law will develop a case by case basis to more adequately define constitutionally protected activites and the right of school authorities to provide for the efficient operation of school activities.

Unfortunately, school personnel know very little about the emerging theories of law and have made little effort to revamp the disciplinary process to anticipate court actions. A review of the texts used in schools of education for law courses indicates an inadequate coverage of procedural due process in the school decision making process.[48] No materials comparable to the "student rights"

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[47] See, Note 1.

[48] The authors of texts used in schools of education for law courses are principally involved in education, not law, and the treatment of legal issues is sketchy. See, e.g., Ware, *Law of Guidance and Counseling* (1964); Drury and Ray, *Principles of School Law* (1965); Rezny, *Legal Problems of School Boards* (1966); Flowers and Bolmeier, *Law and Public Control* (1964); Edwards, *The Courts and the Public Schools* (1955); and Gauerke, *Legal and Ethical Responsibilities of School Personnel* (1959).

handbooks are available to school personnel. However, a number of recent articles and model codes are available to aid in the process of developing suspension and expulsion policies which will stand up under court review.[49] See the Appendix for a Model High School Disciplinary Code.[50]

Instead of waiting for lawsuits, school boards and school administrators would do well to immediately become familiar with these materials and begin the restructuring of the disciplinary process. Methods of approaching the task are legion. However, the effort will be a waste of time unless the complexity of the task is appreciated and the previous efforts of other school systems are thoroughly examined.

One significant threshhold question is the method by which community reaction and input is structured. If community feelings run high on particular issues, a substantial benefit can accrue in letting people bare their grievances. However, an unstructured grievance session is a step far removed from the implementation of precise disciplinary policies. One or more key persons, including an attorney, should do their homework in advance of community forums. To key the discussions, specific alternative rules and disciplinary procedures should be proposed.

Another vehicle for revamping the disciplinary process, which may bring surprising results, is to simply give the students the broad directive to recommend specific rules and sanctions for the violation of the rules.

Throughout this process, the tests likely to be applied by a reviewing court should be kept in mind. The regulations of the status and activities of married and pregnant students, rules concerning

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[49]See, e.g., Holmes, *Student Protest and the Law* (1969); Blair, *Student Rights and Responsibilities* (1968); American Civil Liberties Union, *Academic Freedom in the Secondary Schools* (1968); American Bar Association, *Model Code for Student Rights, Responsibilities and Conduct* (1969); Comment, Legal Aspects of Student Institutional Relationships, 45, Denver, L. J. (1968); Coffee and Green, *Proposal for a Model School Disciplinary Code* (unpublished manuscript by students at the Yale Law School); School District of Philadelphia, *Bill of Rights and Responsibilities for High School Student* (adopted by Board of Education on Dec. 21, 1970); see, also, the cases summarized at notes 40-42.

[50]Faust, *Model High School Disciplinary Procedure Code* (1971).

dress and grooming, and censorship of student expression should be carefully reviewed to determine whether substantial evidence exists to support a finding that unless the regulation is enforced, there is a reasonable likelihood of disruption to the educational process. It is equally important to decide exactly how alledged violations of the rules are to be determined.

Aside from questions of rules and procedure, an important aspect of a review of the disciplinary process is the implementation of sanctions other than suspension and expulsion. There is very little dissent to the proposition that suspension does not make the misbehaving student a better student. In some communities, the threat of suspensions can have a deterent effect with most children. In other communities, the threat of suspension to many children is tantamount to an offer of a reward for bad behavior. For example, a suspended child may face no aversive consequences when he gets home and may gain status with his peers.

The other side of the coin is that suspension is the simplest way for the school to deal with the disruptive child--out of sight, out of mind, and out of the teachers' hair. The teacher will not have to bother with calling in the parents or staying after school. But, why blame the teacher? Suspension and expulsion is the most efficient method of obtaining a manageable class size and may be the only available method to give anyone a chance to learn something.

To cut down on suspension and expulsion, the system must eliminate the built-in punishment for teachers who decide to try alternatives to sending the child to the office for suspension or expulsion.

An effort must also be made to develop innovative programs which enhance the possibility that the truant, failing, and misbehaving student will have some successes in school. Approximately 25% of all charges of juvenile delinquency are based on school truancy, misbehavior in school, incorrigibility, or some other act of the child which does not constitute a violation of criminal law.[51]

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[51]President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 4 (1967).

Several studies of delinquent children have noted their failure in school.[52] The findings of one study indicated that failure at school, along with sex and age, was the factor most often associated with delinquency.[53] An interesting finding of Gold is that the pattern of school grades coincides in some important respects with the pattern of delinquent behavior, especially among boys.[54] In support of his findings, Gold cites two programs dealing with delinquent boys in which efforts to help boys feel that they were competent students produced marked reductions in their delinquent behavior.[55]

To provide failing and misbehaving children with successes and to develop an atmosphere more conducive to learning are admittedly not easy tasks. Nevertheless, the effort must be made, for, if some gains are not made in allaying an atmosphere ripe for disruption, conditions will be intolerable in the school with the school administration and boards getting tougher in applying suspensions only to find themselves as defendants in lawsuits.

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[52]Glueck and Glueck, *Unraveling Juvenile Delinquency* (1950); Wattenberg, "Girl Repeaters," *3 National Probation and Parole Assn. Journal*, 48 (1957); Gold, *Delinquent Behavior in an American City* (1970).

[53]Palmore and Hamond, "Interacting Factors in Juvenile Delinquency, 29 *American Sociological Review* 848 (1964).

[54]Gold, op. cit. supra, note 52, at 123-4.

[55]Bowman, "Effects of a Revised School Program on Potential Delinquents," *332 Annals of the Am. Academny of Pol. and Social Sci.* 53 (1959), and Massimo and Shore, "A Comprehensive, Vocationally Oriented Psychotherapeutic Program for Delinquent Boys," *33 Am. J. of Orthopsychiatry* 635 (1963).

PART II. THE JUVENILE COURT PROCESS

Introduction

In view of the high percentage of juvenile delinquency charges based on school truancy, incorrigibility and misbehavior in school,[56] school personnel should be aware of significant procedural changes in the juvenile court procedure. What precisely did the Supreme Court say? What are the new rights of the child charged with an act of delinquency? What other procedural rights accorded to the adult charged with a criminal offense are not available to the child charged with an act of delinquency?

Questions of greater importance for school personnel, arising in the wake of Supreme Court decisions, have to do with the procedure followed by the school in referring children to the courts. What are the criteria employed by the court in processing referrals to the court? What information is required from the schools before the court will hear a case alleging truancy, incorrigibility, or misbehavior in school? What new procedures have replaced informal probation? How can school personnel best communicate with the court intake officer? What possibilities for negotiations exist where the child has an attorney?

In deciding whether to refer a child to juvenile court, school personnel must assess the need for court intervention. Does the child need the authority of the court to attend school regularly or to refrain from vidations of law? Does the child need to be removed from his home environment? If the answer is "yes" to either of these questions, a more important consideration is whether a referral to the juvenile court will provide any benefit to the child. Furthermore, if a referral to the juvenile court is to be made, sufficient information must be given to the court and appropriate school personnel must be available to testify in court, if necessary.

Aside from concerns in processing referrals to the courts, school personnel should be aware of serious criticisms of the juvenile court system. Historically, the goal of the juvenile court has been to

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[56] See, footnote 51.

rehabilitate the child rather than punish him.

The courts have been attacked for misuse of temporary detention, failure to engage in goal directed activity, a lack of trained personnel, and failure to rehabilitate children charged with an act of delinquency. Are these criticisms valid? If so, what efforts can be made to improve or avoid the juvenile court system?

The Juvenile Court

Juvenile courts have existed in each state for the past several decades. The juvenile court is a specialized court dealing with children who commit delinquent acts or are in need of protective custody. The aim of the court is to provide rehabilitation, not punishment. "The Juvenile Court is theoretically engaged in determining the needs of the child and society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation... not to fix criminal responsibility, guilt and punishment."[57] The procedures have traditionally been informal. In a frequently quoted article on the juvenile court published in 1909, Judge Mack said: "The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work."[58]

As a corollary to the tradition of informal procedures, the child is accorded a hearing closed to the public. In most states, the public is excluded from juvenile court hearings[59] and the records of juvenile court proceedings are confidential.[60]

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[57]Kent v. United States States, 383 U.S. 541, 554 (1966)

[58]Mack, "The Juvenile Court," *23 Harvard L. Rev.* 104, 120 (1909).

[59]See, e.g., *Wis. Stat. Ann.* §48.25(1) (1965); *Cal. Welfare and Institutions Code* §733 (admission at request of youth); *Conn. Gen. Stat. Rev.* §17-67 (1958) (admission at discretion of judge).

[60]See, e.g., *Minn. Stat. Ann* §260.161(2) (Supp. 1966).

The juvenile court proceeding has three distinct stages. The first stage is the intake process in which the complaint is screened.[61] Court intake personnel may "adjust" the case with a warning, a period of informal court supervision, or a referral of the child elsewhere for counseling or treatment.

If the case is not adjusted at the intake stage, the case is scheduled for an adjudicatory hearing (trial) at which point the court determines whether the facts alleged in the complaint are true. Testimony will then be presented by the complainant unless the child makes an admission (enters a plea of guilty). If, at the conclusion of the hearing, the court finds that the alleged facts are true, a dispositional hearing will be held.

At the dispositional hearing, the court will consider the probation officer's report and take whatever testimony is deemed appropriate and will enter an order which is to provide appropriate control, care and guidance for the child.[62] The disposition possibilities include warning, probation, placement in foster home care, placement with relatives, placement in a private half-way house or institution, commitment to a state institution, and temporary detention in a county or regional facility pending hearing or pending placement elsewhere.

As far as temporary detention is concerned, such action may be taken before the adjudicatory hearing (trial) and even prior to the filing of a formal complaint against the child. The statutes permitting such temporary detention vary from state to state. However, such detention is generally permitted where a child has committed a delinquent act of such a nature that he should be confined for his own safety or for the safety of the community.[63]

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[61]See the discussion of the juvenile court intake procedure beginning on page 38.

[62]See, e.g., *Mich. Stat. Ann.* §27.3178(598.1): "each child coming within the jurisdiction of the court shall receive such care, guidance and control, preferably in his own home as will be conducive to the child's welfare and the best interest of the state."

[63]See, e.g., *Standard Family Court Act* §16.

A child charged with an act of delinquency may in certain circumstances be transferred[64] to the criminal court. The statutes vary on the minimum age which a child must have attained before he may be transferred to the criminal court. The minimum age range is from 15 to 20. Prior to such a transfer, the juvenile court judge must determine that the offense charged is within the statutory definition of offenses which may be transferred[65] and that the youth cannot be rehabilitated in the juvenile court.[66]

In view of the rehabilitative purpose and confidential nature of the juvenile court process, certain procedural safeguards, until recently, have been unavailable to a child charged with an act of delinquency. These procedural rights were denied the alleged delinquent for the reasons that the juvenile court process is a civil proceeding rather than a criminal action and that the purpose of such proceeding is to provide corrective care, supervision, and training rather than to punish the child.

The Supreme Court of the United States recently rejected this traditional rationale and determined that children are entitled to the protection of certain procedural safeguards when charged with an act of delinquency.[67]

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[64]This procedure is also referred to as "remand," "certification," or "waiver" to the criminal court.

[65]See, e.g., *N.Y. Family Ct. Act* §725 (transfer may be made where child is 15 or over and the offense alleged is punishable by death or life imprisonment).

[66]The statutory requirements vary considerably. See, e.g., *Iowa Code Ann.* §2323 (interests of public and minor); *Michigan JCR* 1969.11 (a showing of a probable cause to believe that the child has committed a felony, a full investigation to determine whether or not the interest of the child and the public would best be served, and in making such determination the following criteria are to be considered: prior record, maturity, character, pattern of living, seriousness of offense, pattern of offenses, and the relative suitability of programs and facilities available).

[67]In re Gault, 387 U.S. 1 (1967).

The *Gault* Case

On June 8, 1964, a fifteen-year-old boy named Gerald Gault was arrested for allegedly making an obscene telephone call. He was taken to the county detention home without any notice to his family. On the next day, the probation officer signed a petition alleging that Gerald Gault was delinquent. No description of the alleged delinquency was set forth in the petition. At the juvenile court hearing held on June 9, 1964, no notice of the right to counsel was given to Gerald or his mother, no witnesses were sworn, the complainant was not present, and no transcript of the preceeding was made. At the conclusion of the hearing, Gerald was remanded to the detention home.

At a second hearing held seven days later, Gerald was committed to the Arizona State Industrial School "for the period of his minority unless sooner discharged by due process of law."

Subsequently, Gerald's attorney filed a petition for a writ of habeas corpus challenging the constitutionality of the procedures followed in the juvenile court and seeking Gerald's release from the State Industrial School. At the habeas corpus proceeding, there was conflicting testimony as to what Gerald had admitted at the juvenile court hearings. His mother recalled that Gerald said only that he had dialed the complainant's number and handed the telephone to his friend. The juvenile court judge and probation officer testified that Gerald had admitted making one or more of the lewd remarks to the complainant.

The case was eventually appealed to the Supreme Court of the United States. The Supreme Court held that the due process clause of the Fourteenth Amendment of the United States Constitution applies to proceedings in the state of juvenile courts and that the proceedings in the *Gault* case did not meet these requirements. The Court decided that the essentials of due process and fair treatment require (1) the giving of adequate and timely notice of the charges against the child so that the child and his parents will have the opportunity to respond; (2) that the child and his parents must be notified of the right to be presented by counsel in a delinquency proceeding which may lead to

an order of commitment to an institution; (3) that the constitutional privilege against self-incrimination is applicable in a delinquency proceeding; and (4) that the child has the right to confront and cross-examine prosecution witnesses.

The court reviewed the history of the juvenile court system and concluded that "failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."[68] The Court also stated that "[u]nder our Constitution the condition of being a boy does not justify a kangaroo court."[69] The Court noted in passing that if Gerald had been past the age of 18 when he was charged with the offense of using obscene language in the presence of a woman, the maximum penalty would have been a fifty dollar fine and imprisonment for sixty days rather than commitment to the State Industrial School for a potential duration of six years.

Specific Procedural Questions

There has been considerable discussion of the *Gault* decision in law and social work journals. A plethora of questions was not answered by the *Gault* case: Does the child have the right to a jury trial, a public trial, or a speedy trial? How must the parents and child be notified of the right to counsel? May the right to counsel be waived by a child? If so, under what circumstances? May the child insist that the alleged act of delinquency be proved "beyond a reasonable doubt"? Does the child have a right to bail? Must the child have a right of appeal? Does the child have a right to the transcript of the juvenile court proceeding? May a child invoke the guarantee against unreasonable searches and seizures? Do the child and his attorney have the right to cross-examine the probation officer and other persons reporting to the court at the disposition phase of the juvenile delinquency proceeding?

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[68] Id. at 19-20

[69] Id. at 25.

Only two of the foregoing questions have been answered by the Supreme Court of the United States. In the case of *In re Winship*,[70] the Court held that proof beyond a reasonable doubt is required in a juvenile court hearing when a juvenile is charged with an act which would constitute a crime if committed by an adult. However, in the case of *McKeiver* v. *Pennsylvania*,[71] the Court held that despite the fact that trial by jury is fundamental to the American scheme of justice in criminal cases, trial by jury is not required by the Constitution in juvenile court cases.

Criticism of the Juvenile Court System

Numerous writers have quoted the statement of Justice Fortas made approximately one year prior to the *Gault* case. He said "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds:that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[72]

Consider the following statement from the *Gault* decision:

> In fact, evidence is accumulating that confessions by juveniles do not aid in "individualized treatment," as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose...It seems probable that where children are induced to confess by "paternal" urgings on the part of officials and the child's reaction is likely to be hostile and adverse--the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.[73]

Informal Procedures

The traditional view of the juvenile court process as an informal proceeding without the formal trappings of the criminal process has been rejected by most writers. Almost every recent article addressed to this topic cites with approval the National Crime Commission Report:

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[70]397 U.S. 358 (1970).

[71]McKeiver v. Pennsylvania, *39 U.S. Law Week* 4777 (June 21, 1971).

[72]Kent v. United States, 383 U.S. 541, 556 (1966).

[73]In re Gault, 387 U.S. 1, 51-52 (1967).

> There is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers.[74]

The argument in favor of formal juvenile court procedures is that such procedures demonstrate the dignity and fairness of the law to the juvenile offender and impress him with the seriousness of his act.[75] However, opinions on this point are not unanimous. The advocates of informal procedures regard the formal trappings of a criminal trial as a deleterious influence upon the child in that the court appearance may satisfy youthful urges for notoriety and attention.[76]

Stigmatization of Child by Court Action

As far as the need for confidentiality is concerned, there appears to be no dissent to the proposition that publicity of a juvenile court proceeding, with its attendant stigma, impedes the rehabilitation of the child involved. However, despite statutes providing for the exclusion of the public from juvenile hearings, the child's juvenile court record follows him.

Court records are often available directly from the court personnel due to careless supervision of the records or an official policy of the court. The FBI certainly has no trouble obtaining juvenile court records. Military personnel and certain employers also have developed an imaginative scheme to get at court records. The applicant is asked to waive his right to confidentiality by signing an authorization for the opening of his records. If he refuses, he is simply dropped from consideration for employment or military assignment.

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[74]President"s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 85 (1967).

[75]See, e.g., "Comment, Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal," *114 U. Pa. L. Rev.* 1171, 1217 (1966).

[76]See, e.g., Tappan, *Juvenile Delinquency* 146 (1949).

In most jurisdictions, police files are accessible to prospective employers, military personnel, and probation officers in the adult courts. Police files usually indicate whether a child has been referred to the juvenile court on a particular charge but seldom indicate the disposition of the case and thus omit any findings that the child may not in fact have been infolved in the charged violation.[77] In recognition of this fact, the California statute specifically provides for the sealing of juvenile records in the hands of all governmental units upon the application of any persons five years after his discharge from court jurisdiction.[78] There are also a number of recent appellate court decisions which have upheld juvenile court orders to seal policy records despite the absence of a statute authorizing such sealing.[79]

It has been argued that a referral to the court may actually enhance the possibility that the child will engage in subsequent acts of delinquency. A number of writers have indicated that when a child is charged with an act of delinquency and is processed through the juvenile justice system a self-fulfilling prophecy seems to be set in motion which confirms the child as a delinquent. This hypothesis was first identified as the "labelling process" by Wheeler and Cottrell[80] and was reiterated in the National Crime Commission Report.[81]

In a study of the effect of apprehension of juvenile offenders, Gold and Williams state that "it is unsettling, however, to realize that the number of recidivists is not only larger than one would

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[77]See, Note: "Rights and Rehabilitation in the Juvenile Courts," *67 Colum. L. Rev.* 381, 285-287 (1967).

[78]*Cal. Welfare and Institutions Code* §781. The sealing of records is also referred to as "expungement" or "vacation" of the record.

[79]See, e.g., United States v. McLeod, 386 F.2d 734 (5th Cir. 1967).

[80]Wheeler and Cottrell, *Juvenile Delinquency: Its Prevention and Control* 22-27 (1966). See, also, Eysenck, *Fact and Fiction in Psychology* 257-294 (1965) (data presented suggest that the offense rate of individuals varies as a function of the severity of their correctional experiences); Lemert, *Human Deviance, Social Problems and Social Control* 40-64 (1967) (Lemert refers to the predictable subsequent arrest of a suspect previously known to law enforcement officials as "secondary deviance determination").

[81]*Juvenile Delinquency Task Force Report*, op. cit. supra, note 51 at 32.

reasonably expect, but the number is also larger than if *nothing had been done*--larger than if no delinquents had been incarcerated, had appeared before the court, or indeed, *had been caught at all*."[82] However, the authors do not recommend that juvenile offenders not be apprehended. Instead, they recommend that experimental treatment programs be carefully formulated from what is scientifically known about delinquency and that the successes and failures of such programs be carefully documented so that the mistakes of others are not repeated.[83]

Temporary Detention Practices

Probably the most common disposition of a troublesome case is the placement of a child in detention pending a hearing. The practice of detaining a child for observation and study for one or two months is not uncommon in some jurisdictions. The National Crime Commission Report states that many state statutes have failed to articulate standards for exercising the power of detention, that judges rely excessively on detention in non-dangerous cases, and that detention is employed as a means of shocking or punishing children.[84]

Failure to Provide Effective Treatment

Although rehabilitation is the predominant goal of the juvenile court process, the hopes held for the juvenile court have not been fulfilled. Over half of the children who pass through juvenile institutions will be returned for new offenses. The National Crime Commission Report concludes that "the postulates of specialized treatment and resulting reclamation basic to juvenile court have significantly failed of proof, both in implementation and in consequences."[85]

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[82]Gold and Williams, "National Study of the Aftermath of Apprehension," *3 Prospectus* 3, 4 (1969).

[83]Id. at 12.

[84]*Task Force Report*, op. cit. supra, note 51 at 13, 19, and 36.

[85]Id. at 23.

With the exception of innovative treatment programs established in a very few communities, most courts are sorely lacking in viable treatment programs. The limited treatment resources available to most juvenile courts have meant that recidivism is as much a possibility as rehabilitation:

> The dispositional alternatives available even to the better endowed juvenile courts fall far short of the richness and relevance to individual needs envisioned by the court's founders. In most places, indeed, the only alternatives are release outright, probation, and institutionalization. Probation means minimal supervision at best....Institutionalization too often means storage--isolation from the outside world in an overcrowded, understaffed, high-security institution with little education, little vocational training, little counseling or job placement or other guidance upon release.[86]

Although commitment to an institution is purportedly made for purposes of treatment and rehabilitation, institutionalization most frequently means segregation from the community in the authoritarian and punitive atmosphere of a training school. Community-centered treatment programs providing effective group and individual therapy are still very much the exception.

> Delinquency institutions today--with few exceptions--manifest practices based on the concepts of retaliation... strict obedience enforced through military-type discipline, protection through custodial care, education through provision of mostly vocational and often outdated training, sometimes individual or group therapy unrelated to the rest of the milieu, and especially an overall separation from the community."[87]

In addition to problems of overcrowding and understaffing, training schools must deal with the inherent limitations of having to undertake conflicting objectives of custody as well as education and treatment. In the effort to maintain order, treatment may be relegated to a very insignificant position. Moreover, to the extent that any program of therapy and counseling is provided, it "is significantly compromised by the peculiar nature of the child and setting. Since

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[86] Id. at 8.

[87] Konopka, "Our Outcast Youth," *15 Social Work* 76, 80 (Oct., 1970).

the child is younger, less experienced, untrained, and an inmate, he generally construes his status in the relationship as inferior to the counselor's and he tends to see himself as basically wrong and obliged to change fundamentally...."[88] Finally, when the limited treatment provided is secondary and unrelated to the custodial program, "it generally commands little respect among the children and, as a result, has little impact upon the bulk of them."[89]

Although ultimate solutions for the juvenile court's failure to afford adequate treatment may lie in greater appropriations of resources and carefully planned experimental treatment and research programs, the emerging legal concept of the "right to treatment" may provide a remedy for some of the more flagrant institutional practices.

The right to treatment concept originally applied to the incarcerated mentally ill. It is based on the premise that the deprivation of liberty involved in a court commitment must be justified by the provision of treatment and that the promise of treatment contained in the statutes authorizing such commitment must be realized in fact.

In 1954, a U.S. District Court held that, given the rehabilitative philosophy of the juvenile court statutes, a juvenile could not properly be held in jail. The court said that "unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education, and training rather than punishment,.... a commitment....cannot withstand an assault for violation of fundamental Constitutional safeguards."[90]

More recently, a number of courts have indicated that appropriate treatment is essential to the validity of juvenile custody, and that a juvenile may challenge the validity of this custody on the ground

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[88]Ferdinand, "Some Inherent Limitations in Rehabilitating Juvenile Delinquents in Training Schools," *31 Fed. Probation* 30, 33 (Dec., 1967).

[89]Id. at 35

[90]White v. Reid, 125 F. Supp. 649 (D.D.C. 1954)

that he is not, in fact, receiving any special treatment. The courts have begun to examine not merely the type of institution but also the particular treatment afforded a juvenile. In the case of *Creek* v. *Stone*[91], for example, a juvenile challenged his confinement in the court receiving (detention) home on the ground that the home did not provide the psychiatric assistance he needed. In *Lollis* v. *New York State Department of Social Services*[92], a fourteen year old girl confined in a training school petitioned the courts to review the school's practice of confining children in isolation for long periods of time when they "acted out." The court concluded that confinement of a child in night clothes for several weeks in a striped room with no recreational facilities violates the Constitution's ban on cruel and unusual punsihment. Moreover, the court indicated the cruelty of the punishment was counterproductive to the development and rehabilitation of the child.

Juvenile Court Personnel

The prospects for rehabilitation depend, in part, on the expertise of juvenile court personnel. It is a well documented fact that social service and probation personnel are overburdened and undertrained. The court worker must screen complaints, negotiate with complainants, assess the need for intervention in the life of the child, assess the need for *court* intervention, advise the child and his parents of their procedural rights, collect information, present such information to the court orally and in writing, implement a treatment plan for the child and his family. If the court worker has more than 20 children as his responsibility, he will have almost no time to deal with a child or his family on an individual basis. Instead, his time will be spent in court hearings, preparing reports for hearings, and dealing with crisis situations. Also, a great deal of time is wasted by juvenile court personnel in collecting information which is never used

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[91] 379 F.2d 106 (D.C. Cir. 1969).

[92] 322 F. Supp. 473 (S.D. N.Y. 1970).

by the court.[93]

The plight of the overburdened court worker is compounded further by the lack of court policy guidelines and training materials for juvenile court personnel. Vinter and Sarri state the problem:

> [T]he reluctance to specify the preferred alternatives, as policy guidelines, does not result in greater flexibility of action. It does lead to over-assessment of situations, to delays in decision-making and to dispositional trends based on unstated preferences. Perhaps more importantly, it reduces the court's capability of deliberately charting its course and modifying directions on the basis of experience.[94]

Unfortunately, many important decisions made in the juvenile courts are based on the predilections and whims of subordinate personnel. Research reveals that judges have often lost effective control over court operations and that the court worker can determine the fate of the child.[95]

To be effective, the juvenile court must adopt policy guidelines setting forth the basic operational objectives of the court, decisions to be made by the court worker, criteria for judicial scrutiny of the court workers' decisions, questions to be reserved for judicial decision, criteria to be employed by the court in making decisions, information required by the court to make such decisions, guidelines for the participation of attorneys, and rules of practice for court workers governing plea-taking, investigation of facts, recording of information, the presentation of information to the court and the implementation of plans for the treatment of children.

Obviously, school personnel must make an effort to pinpoint the decision making process in the juvenile court prior to making any

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[93]Vinter and Sarri, "The Juvenile Court: Implications of Research Findings for Action Strategies," in *Juvenile Court Hearing Officers Training Manual*, Volume II, 197, 198; see also, "The National Survey of Youth: A Critique," *1 Prospectus* 13, 20 (1969); and Piersma, "The Need for Court Policy Guidelines and Training Materials for Juvenile Court Personnel," (1970) (unpublished manuscript prepared for the Michigan Office of the Supreme Court Administrator).

[94]Vinter and Sarri, op. cit. supra, note 84 at 211.

[95]Vinter, "The Constitutional Responsibilities of Court-Related Personnel" in *Nordin, Gault: What Now for the Juvenile Court?* 128 (1968).

referrals to that court.

Attorney Participation in Juvenile Delinquency Proceedings

It has been predicted that as a result of the *Gault* decision, attorneys will be appearing more often in the juvenile courts and court personnel will find themselves confronted more often by attorneys.[96] This prediction appears to be somewhat of an overstatement. In most juvenile courts, the child is informed of his right to a court appointed attorney and then is required to make some affirmative response before an attorney is appointed for him. The child is usually given this information at the intake conference. The child and his parents are frequently told by intake personnel that an attorney is not necessary but that they may have a court appointed attorney if they wish.

A number of writers have urged that attorneys be appointed automatically for a child before he is allowed to respond to the charge against him.[97] "*Gault* does not resolve the issue explicitly either way, but it strongly suggests that counsel should be appointed automatically and the juvenile afforded the opportunity to talk to a lawyer before making a decision to plead involvement."[98]

One exception to the general practice is the procedure followed in the New York City Family Courts in which the appointment of a lawyer for the child is nearly automatic.

An important factor which limits the appearance of attorneys in the juvenile courts is that the pay is poor. Obviously, most children are indigent. And most parents of children charged with an act of delinquency are reluctant to hire an attorney for the child. Thus, aside from a sprinkling of attorneys employed by legal services programs and fewer retained attorneys, court appointed attorneys represent children in the courts. Payment for services of the court appointed attorney is determined by the juvenile court judge. The problem is that

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[96] *George, Gault and the Juvenile Court Revolution* 15 (1968).

[97] "Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by the child or parent." *President's Commission*, op. cit. supra., note 74 at 87.

[98] Dorsen and Rezneck, "In re Gault and the Future of Juvenile Law," *1 Fam. L. Q.* 1 (1967).

a court appointed attorney who does a thorough job for his client in negotiating with intake personnel, in presenting every appropriate defense at the juvenile court hearings, and in participating actively at the dispositional phase of the process, may receive no more remuneration than an attorney who fails to prepare for the hearings. Attorneys have not taken aggressive action to change this state of affairs for the simple reason that established attorneys successfully avoid more than one or two juvenile court appointments per year. Traditionally, established attorneys have disliked working in the juvenile courts. Juvenile cases tend to be ranked with traffic and misdemeanor cases.

However, although the juvenile courts have not been ununDated by attorneys subsequent to the *Gault* decision, the appearance of attorneys in the juvenile courts has definitely increased. One notable post-*Gault* development is that attorneys now can argue points of law. See the foregoing discussion on the legal issues which remain unanswered by the *Gault* decision. The pre-hearing motion to suppress illegally obtained evnidence is now being made frequently in juvenile proceedings to challenge the admissibility of confessions taken from the child, identification of the child based on police lineups, and allegedly illegal evidence against the child obtained during searches.[99]

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[99]The specific holding of the *Gault* case applies only to the adjudicatory stage of the juvenile delinquency proceedings. Thus, the state courts (eventually the U.S. Supreme Court) must decide whether children are entitled to invoke constitutional guarantees against unreasonable searches and seizures, whether the right to counsel applies at the police station, whether children taken into custody have the right to contest and the legality of the detention and whether the admissibility of statements made to police or probation officers is governed by the requirements of Miranda v. Arizona, 384 U.S. 436 (1966) (several specific requirements must be met before any statement made by the criminal defendant while in custody may be used against him at trial).

Attorney as Negotiator

The attorney appearing in juvenile court may take any one of a number of stances in representing the child.[100] An attorney may recommend to the child that he plead guilty if he is satisfied that the child was involved in the alleged incident and then concentrate his energies on getting a favorable disposition for the child.[101] In following this approach, the attorney may first negotiate with intake personnel in an attempt to have the case dismissed. The attorney may obtain the agreement of the intake personnel to modify the charge against the child in return for his promise to cooperate with court personnel in working toward an appropriate plan for the child. This tactic is known as "plea bargaining." For example, if a child is charged with stealing several automobiles, the intake worker may agree to dismiss one or more of the charges or reduce one or more of the charges from "auto theft" to the lesser offense of "tampering with a motor vehicle" in return for the agreement of the attorney not to contest the case.

The attorney may also urge the child and his family to attend sessions at a guidance clinic in an effort to prove to court personnel that some tangible out-of-court action is being taken by the family and that court intervention is unnecessary in view of such action.

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[100]For discussions of the role of the attorney in the juvenile court, see, "The Role of the Lawyer in Representing Minors in the New Family Court," *12 Buffalo L. Rev.* 501 (1963), Platt, Schecter, and Tiffany, "In Defense of Youth: A Case Study of the Public Defender in Juvenile Court," *43 Ind. L.J.* 619 (1968); Skoler, "The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings," *43 Ind. L. J.* 558 (1968; and Friedman and Platt, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," *116 U. Pa. L. Rev.* 1158 (1968).

[101]"Often....the court itself is not equipped nor does it have access to sufficient facilities to provide adequate remedial programming... An attorney altert to such a situation may render valuable service, both to his client and to the court, by directing attention to the fact of the inadequacy, and asking that his client not be subjected to the ill effects usually attendant. And furthermore, he may...propose a solution to the dilemma, by exercising his initiative and devising a suitable, though perhaps novel, program of his own making," Treadwell, "The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker or Otherwise," *Juv. Ct. Judges J.*, Fall, 109, 113 (1965). See also, Note, "Employment of Social Investigation Reports in Criminal and Juvenile Proceedings," *58 Colum. L. Rev.* 702 (1958).

If school personnel referred the child to the juvenile court, the attorney may serve as the liaison between the school and child in an attempt to provide a school program for the child in which the child may have some chances for success. From the school's point of view, this certainly is the most constructive position the attorney could take. School personnel should make a "good faith" attempt to meet with the attorney who wishes to work with the school in finding an appropriate program for the child. However, school personnel will run into distressing situations in negotiating with attorneys unless they have prepared their position carefully. For example, the attorney may have some very naive or bizarre notions as to the optimal school program for the child in question. It is not unusual to hear court personnel complaints about attorneys who take the role of social worker when representing juveniles.

Attorney Trial Tactics

Another mode of representation which may be adopted by the attorney is to participate vigorously and present every appropriate defense at the fact-finding hearing in the juvenile court.[102] If the charge against the child is "truancy" or "incorrigibility in school," the attorney would demand that the charges against the child be spelled out specifically and that school personnel prove that the alleged acts of delinquency were in fact committed by the child. As far as the charge of "truancy" is concerned, school personnel would bear the initial burden of proof to show that the child has missed a substantial number of school days. Next, it must be shown that the child missed school without sufficient reason. To meet this element of proof, the school must outline the permissible grounds for absence from school and show that the child did not submit sufficient proof to receive permission for his absence from school. The attorney then may raise any one of a number of possible defenses: that the school's procedure in

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[102]"Conscientious counsel will have to exercise intelligent discrimination in the use of tactics learned in other courts since wholesale importation of techniques developed in the handling of criminal or civil cases before other tribunals may not only threaten the objectives of the court but will rarely serve the interest of the minor child." Isaacs, "The Role of the Lawyer in Representing Minors in New FAmily Court, *12 Buffalo L. Rev.* 501, 506 (1963).

granting permission for absences is unreasonable or arbitrary, that the school has failed to follow statutory procedure in not properly notifying the parents of the alleged absences or that the child was unable to attend school by reason of illness, parental neglect, or unofficial suspension from school by a teacher. School personnel must then make an effort to rebut the defenses asserted by the attorney for the child.

If the charge against the child is "incorrigibility in school," the school must state specifically the alleged acts of inccorigibility; must prove that the alleged acts of the child occured in fact; that the alleged acts constitute violations of school rules; that violations of school rules are so numerous that he is beyond control; and that the school has exhausted its programs in dealing with the child. Obviously, if the attorney for the child presents a vigorous defense, school personnel will have a very difficult time in proving incorrigibility.

Furthermore, a contested juvenile court hearing on alleged "truancy" or "incorribibility" necessitates the waste of much valuable time. And, unless the fact-finding hearing demonstrates to the child the dignity of the law and impresses him with the seriousness of his action (a dubious possibility), the juvenile court hearing on the facts accomplishes nothing of benefit for the child. In most cases, everyone involved with the child, including his attorney, agrees that the child cannot cope with school and that some modification in the school program is necessary if the child is to have any chance for success in school.

The lesson for school personnel is, that prior to a court contest, every effort should be made to negotiate with the child's parents, court intake personnel, and the child's attorney in an attempt to set up a modified school program with which the child can cope and within which the child has some chance for success in school.

Decisions by Court Intake Personnel

At the intake stage of the juvenile court process, the court intake worker performs tasks analogous to those performed by the prosecuting attorney in authorizing the filing of a charge in a criminal case. The intake worker must determine whether the facts alleged in the complaint, if found to be true, provide a basis for court action. Next, he must satisfy himself that from the complaint and supporting documents there are reasonable grounds to believe that

the facts alleged in the complaint are true. He must then decide whether court intervention (rather than referral to a child guidance agency, etc.) is necessary to protect persons or property and whether court intervention will provide any benefit to the child.[103]

Although the juvenile court judge determines the basic policies for decision making at the intake stage,[104] court intake personnel usually have a great deal of power in determining the fate of a particular case. Judicial control over intake decision making varies markedly depending on the inclinations of the Juvenile court judge. However, if the complainant is dissatisfied with the intake decision, he will usually be able to have at least an informal conference with the judge even if the statute or court rule does not provide for a formal review of intake decisions.

A large percentage of delinquency cases never proceed beyond the intake stage. Sometimes the case is dismissed at the intake stage by reason of insufficient facts. More often, the dismissal of the case is based on treatment considerations.[105]

The initial goal of the intake worker is to achieve a settlement of the complaint by means of a referral to another agency or a period of (official or unofficial) short-term court supervision. The possibilities for adjustment of the case at this stage are legion.

Investigation by Intake Officer

However, before any disposition can be implemented, some sort of intake investigation must be completed. The statutes usually explicitly provide for some form of investigation--a preliminary investigation, a preliminary inquiry, a conference with interested parties or even a thorough investigation.[106] The extent and nature of the preliminary investigation depends on local court policy guidelines, if any, the

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[103]For excellent discussions of the juvenile court intake process, see, Note, "Juvenile Delinquents: The Police, State Courts, and Individualized Justice," *79 Harv. L. Rev.* 775, 789 (1966); and Note, "Rights and Rehabilitation in the Juvenile Courts," *67 Colum. L. Rev.* 281, 323 (1967).

[104]Guidelines for juvenile court judges are non-existent except for the brief and outdated discussion in *National Council on Crime and Delinquency, Guides for Juvenile Court Judges* 36 (1963).

[105]See, Note, op. cit. supra, note 103 at 295.

[106]*Standard Family Court Act* §12(1) (preliminary investigations); *Mich. Stat. Ann* §27.3178 (598.11) (preliminary inquiry); *N.Y. Family Ct. Act* §734 (a)(i) (conference with complainants and interested parties); *R. I. Gen. Laws Ann.* 8-10-22 (thorough investigation).

quality and extent of supervision of the intake worker, and the training and experience of the intake worker conducting the investigation.

Theoretical Orientation of Intake Worker

How does the intake worker decide what action to take? If the intake worker takes a behavioral approach to the assessment of the need for court intervention, he will attempt to determine the desired changes in the behavior of the child or his family. If the worker believes that some form of intervention is necessary, he will attempt to determine whether a child's behavior can be monitored, what the child perceives as rewards, whether such rewards can be provided, and whether someone has the time and skills to set up and modify a program providing for the reinforcement of desired behaviors.

If the intake worker's education has been slanted toward some form of psychoanalytic approach to the assessment and treatment of errant behavior, he will consider the advisability of some form of family therapy or individual uncovering therapy and will seek to assess the nature of the child's emotional disorder or family pathology. The intake worker may then attempt to assess whether the child sees himself as having a problem and whether the child and his family are willing to seek professional help.

Aside from local court policy guidelines, if any, and the theoretical orientation of intake personnel, the availability of referral resources is also important. Obviously, the referral of a child to an agency for treatment cannot be made unless such agencies are available and an efficient mechanism for referral has been established.

Intake Dispositions

Depending on the predilections of intake personnel, a number of complaint adjustment techniques are utilized.

Official Warnings

If the child has been referred to the court on a minor charge and the court intake worker determines that court intervention is not necessary but that the child needs to be impressed with the seriousness of his actions, he may schedule the case for a formal hearing and request that the judge dismiss the complaint with a stern warning. The court

worker traditionally follows the court's warning with a lecture to the child on his good fortune in being allowed to return home and in not having been charged in the adult criminal court.

Informal Probation

A common practice is to delay the intake decision with the understanding that the case will be dismissed if the child makes restitution, apologizes to the complainant, completes a work detail at the police station, obtains employment, attends school regularly for a certain number of days, or takes some other action. Included in such periods of informal probation may be a requirement that the child and his family participate in "counseling" or "therapy"[107] sessions with the court worker. The judge may also order such a period of informal supervision. In most jurisdictions, the statutes authorizing a continuance or adjournment of the case do not require any findings that the child was involved in the alleged acts of delinquency.[108]

However, in the wake of a great deal of recent criticism of informal probation, a number of recent statutory revisions have limited the period of informal supervision.[109] Another recent statutory approach is to provide for court dispositions. Such proceedings are known as PINS cases[110] or consent cases.[111]

The Michigan Juvenile Court Rules provide a good illustration of the limited court supervision without the necessity of a determination of delinquency:

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[107] Juvenile court personnel have been heard to refer to themselves as "therapists" or "psychotherapists" despite a lack of specialized training in the behavioral sciences.

[108] See, e.g., *Conn. Gen. Stat. Ann.* §17-68 (provides that the court may "withhold or suspend judgement").

[109] See, e.g., *Standard Family Court Act* §12(1) (no informal supervision over 3 months without review by judge or director).

[110] *N.Y. Family Ct. Act* §734 (a child adjudicated--a PINS--person in need of supervision--may not be incarcerated as a result of such adjudication).

[111] *Michigan Juvenile Court Rules of 1969 4.3(c)* (no change of custody may be ordered if a child is placed under court supervision pursuant to a consent decree).

Consent Calendar

> If it appears protective and supportive action by the court will serve the best interests of the child and of society, the court may, upon authorizing the filling of a petition, and with consent of the child and all interested parties, proceed informally to hear the matter. No commitment, or change of custody may be ordered as a part of a disposition of cases on the consent calendar.
>
> Proceedings with regard to a child may not be transferred from the consent to the formal calendar subsequent to agreement of the parties to use such calendar. Nothing herein shall foreclose the filing of a complaint or petition alleging a new offense and the hearing thereof on the formal calendar. In the event further court action shall not be required, the court may order all records relating to matters on the consent calendar expunged.[112]

Court supervision of children pursuant to consent agreements varies markedly depending upon the inclinations of court intake personnel and the judge's predilections. Some judges view consent supervision as a term of unenforceable probation for the reason that no change of custody may be ordered unless the child is subsequently found to have committed a delinquent act. It makes little sense to them to order specific rules of probation if such rules are unenforceable.[113] Certainly, court supervision of a child pursuant to a consent agreement will be an exercise in futility unless the procedure is used selectively.

Most juvenile courts have not prepared written guidelines for the use of consent supervision or other forms of informal supervision. For that matter, it is rare to find any kind of written guidelines spelling out the tasks of the court intake worker and the disposition possibilities available at the intake stage of the juvenile court process.

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[112] Id.

[113] Comments of some of the Michigan judges at a conference held on Feb. 11, 1970, in Lansing, Michigan, sponsored by the Office of Supreme Court Administrator.

Implications for School Personnel

It is important that school personnel attempt to ascertain the dispositions available at the intake stage of the local juvenile court process. An attempt should also be made to identify the criteria employed by court staff in processing referrals to the court. "From the pragmatic standpoint, the pre-judicial stage provides the most frequent and the best opportunity for dispensing justice and "treatment" to the alleged juvenile offender. It also provides an opportunity for abuse, discrimination, and extra-legal measures."[114]

In deciding whether to refer a child to the court, an assessment must be made of the need for intervention in the life of the child and his family. Who should assess the need for such intervention? Juvenile court staff? A youth services bureau? A traditional family service agency? A psychiatrist or psychologist? The answer depends at least in part, on the theoretical orientation of school personnel.

If the determination is made that some form of intervention is necessary, what is the need for *court* intervention? Is the authority of the court effective to reduce law violating, to keep children in school and to make them behave? Probably not. But the juvenile court will not disappear nor go out of business. That being the case, school personnel should look at the possibilities of juvenile court reform.

A starting point might be to work with existing citizens' groups formed to advise the juvenile court judge. Many judges are more than happy to listen to well articulated recommendations and plans for action to develop: (1) procedures to seal police and court records, (2) foster homes, half-way houses, and group homes as alternatives to placement of children in institutions, (3) a youth services bureau to take over intake screening functions which frees staff time to work with children under court supervision, (4) staff training sessions, and (5) a community volunteer program designed to aid court staff.

One predictable result of a community volunteer program is the modification of the volunteer's notion of effective techniques in

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[114]Foster, "Notice and 'Fair Procedure': Revolution or Simple revision?"in *Nordin, Gault: What Now for the Juvenile Court?* 51, 57 (1968).

working with "delinquents." The volunteer is much less likely to come away with the "lock-em-up and throw away the key" attitude.

School personnel should also become involved in community efforts to acquire police officers who have had training and experience in working with young offenders. The possible modes of participation would include the search for an imaginative program to increase positive contacts between community youth and police officers.

Another possibility is participation in juvenile delinquency prevention planning. Under the Juvenile Delinquency Prevention and Control Act of 1968, the states must submit comprehensive delinquency plans prior to distribution of funds for implementation of prevention and rehabilitation programs. Also, under the Omnibus Crime Control and Safe Streets Act of 1968, the state must develop comprehensive law enforcement improvement plans, of which juvenile delinquency planning is a required and major component. In both cases, local planning groups are responsible to submit specific delinquency programs which meet federal requirements for funding.

School personnel should make an effort to ascertain the nature and scope of community projects for "delinquent" youth. Important contributions to local planning include efforts to assure that new proposals for federal funding are carefully formulated from what is scientifically known about delinquency, to insist that the target population for whom programs are designed is precisely defined, and to include a research component for measuring the effectiveness of such proposals.

As far as procedure is concerned, efforts should be made to prod the State Supreme Courts to promulgate rules of practice and procedure to assure uniform administration of the juvenile court statutes throughout the state.

Consideration should also be given to the possibilities of participating in efforts of local bar associations and other community groups in establishing public defender systems to provide legal counsel to indigent children coming before the court. Reliance on court-appointed attorneys results in uneven quality representation for children from indigent families. In most jurisdictions, court-appointed attorneys are underpaid and in some jurisdictions, the attorney is commanded to

"volunteer" his services. Frequently, such attorneys have no interest in and are inadequately prepared to represent a child charged with an act of delinquency.

The possibilities for reform of the juvenile justice system are numerous. The key problem is to cut through bureaucratic inertia and fiddle-faddle as the first step in implementing a plan for action.

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APPENDIX

MODEL HIGH SCHOOL DISCIPLINARY CODE

§1 Article I - Preliminary Procedure

No student shall be suspended, transferred or expelled, by the School Board or any of its agents, unless the requirements of this Code are specifically and completely followed.

§2 Where the principal determines to impose any disciplinary action regulated by this Code, he may either:

(a) temporarily suspend the student under the provisions of §3 of this Code; or

(b) invoke the hearing procedure provided for in Article II of this Code.

The implementation of either of these alternatives with regard to a particular factual incident should preclude the use of the other.

§3 The principal of a school may temporarily suspend any student, where the continued presence of the student at the school at that time will be detrimental to the physical or educational interests of the other students. No temporary suspension shall continue past the opening of the second regular school day after the day on which the temporary suspension begins, or be renewable. Where the principal temporarily suspends any student he shall immediately, either in person or by certified mail, give both to the student and to his parent or guardian, a written notice which shall include, but not be limited to, a description of the act or acts upon which the temporary suspension is based, and the duration of the temporary suspension which has been imposed. The imposition of a temporary suspension pursuant to this section shall preclude any other disciplinary action based upon the same factual incident.

§4 No student shall be suspended, transferred or expelled, except as provided for in §3 of this Code, by the School Board or any of its agents, except for the violation of any of the following regulations:

a) assault or battery upon any other person on school grounds;

b) continued and repeated willful disobedience of school personnel acting in their official capacity, which results in a disruptive effect upon the education of the other children in the school; or

c) possession or sale of alcohol or narcotic or hallucinogenic drugs or substances on school premises.

Copies of these regulations shall be sent to all students, as well as to their parents or guardians, at the beginning of each shool year.

Comment: The intent here was to specify every reason for suspending, transferring, or expelling a student from a school. If it is felt that there is any basis not included here which is substantial enough to justify serious disciplinary action, it should be specified. Three other possibilities worth considering are:

1) academic dishonesty including cheating or plagiarism;

2) theft from or damage to institution premises or property; and

3) intentional disruption or obstruction of the educational function of the school.

§5 The principal shall have the sole power to initiate proceedings to suspend, transfer, or expel any student. This process shall be commenced by the giving of notice under the provisions of §6 of this Code. Where the principal has given notice pursuant to §6 of this Code, and where the principal further determines that the continued presence of the student in the school at that time will be

detrimental to the physical or educational interests of the other students, the principal may suspend the student pending a hearing.

No suspension pending a hearing may continue beyond the beginning of the sixth regular school day after the day on which the suspension pending a hearing begins, or beyond the time of the hearing, whichever comes first, except as provided in §9 of this Code.

§6 Prior to the imposition of any suspension, transfer, or expulsion upon any student, except as provided for in §3 above, the principal shall, either in person or by certified mail, give to the student and to his parent or guardian a written notice which shall include:

a) a description of the alleged act upon which disciplinary action is to be based with reference to the §§ of §4 of this Code which allegedly has been violated;
b) the nature of the disciplinary action which is sought to be imposed upon the student;
c) the time and place at which the hearing, provided for in this article, shall take place; and
d) a statement of the student's rights at the hearing, including, but not limited to, the right to counsel, the right to counsel at School Board expense where the student is indigent, and the right to confrontation and cross-examination of witnesses.

§7 Prior to the imposition of any suspension, transfer, or expulsion upon any student, except as provided for in §3 above, a hearing shall be held by a Hearing Board to determine whether the imposition of the disciplinary action proposed by the principal is warranted. Except as provided in §9 of this Code, this hearing shall be held within five school days of the date on which written notice, pursuant to §6 of this Code, is given.

The Hearing Board shall consist of eight members, the presence of six of whom shall constitute a quorum, to include:

a) two teachers, to be selected annually from the faculty of the school by the faculty of the school;

b) two parents of students at the school, to be selected annually by and from the parents of the students of the school;

c) two administrators from the school, appointed by the School Board; and

d) two students selected annually from the student body by the students.

Wherever possible, no person shall serve on the Hearing Board for more than one year consecutively. A student may elect to have his hearing conducted solely by the two teachers and the two administrators as provided for in §a and §c above, and to have the proceedings of the hearing kept confidential. Such an election by the student shall not affect any of his other rights under this Code.

§8 No finding that disciplinary action is warranted shall be made unless a majority of the Hearing Board has first found, beyond a reasonable doubt, that the student committed the act upon which the proposed disciplinary action is based. In no case shall a finding that disciplinary action is warranted be made unless a majority of the Hearing Board concur in that judgment.

§9 Any student against whom disciplinary action is proposed is guaranteed the right to a representative of his own choosing, including counsel, at all stages of the proceeding against him. If a student is unable, through financial inability, to retain counsel, the School Board shall incur the cost of retained counsel for the child. In no case may a waiver of the right to counsel be made, except by the student with the concurrence of his parent or guardian.

The representative chosen by the student may have the hearing postponed for not longer than one week where necessary to prepare his case. Where the hearing is postponed at the request of the

student's representative, and where, in addition, the principal finds that the presence of the student in the school during that period will be detrimental to the physical or education interests of the other students, the principal may continue the suspension pending the hearing of the student for one week or until the hearing takes place, whichever occurs first.

§10 No finding may be made except upon the basis of evidence presented at the hearing. Only evidence which is relevant to the issue being considered by the Hearing Board shall be presented. Only the kind of evidence upon which responsible persons are accustomed to rely in serious affairs may be relied upon by the Hearing Board. All testimony shall be given under oath. The Hearing Board shall state, in writing, its finding of fact as well as the basis upon which these findings were made.

§11 The right to confrontation and cross-examination of witnesses is guaranteed to any student against whom disciplinary action is proposed.

§12 The School Board shall have the right to compel the presence before the Hearing Board, upon reasonable notice and at reasonable time and places, of any of its employees, for the purpose of presenting evidence to the Hearing Board relevant to its inquiry. The School Board shall compel the presence of any person as provided hereinabove whose presence is requested by the student against whom disciplinary action is proposed. Nothing in this section shall be deemed to infringe upon the right of either the principal or the student to present the relevant testimony of any person whose presence cannot be compelled by the School Board. Further, nothing in this section shall be deemed to infringe upon the privilege against self-incrimination guaranteed to all persons by the Fifth Amendment to the Constitution of the United States.

§13 No suspension shall continue for longer than four weeks after the date of the hearing, or until the end of the semester, whichever comes first.

§14 In the event that disciplinary action shall not be found warranted by the Hearing Board, all school records of the proposed

disciplinary action, including those relating to the incidents upon which it was predicated, shall be destroyed.

FOR FURTHER REFERENCE

The ERIC Clearinghouse on Educational Management Administration at the University of Oregon has provided leadership in the development of other documents relating to the legal rights of seondary school students. These include:

1. Reuther, Edmund E., Jr. *Legal Aspects of Control of Student Activities by Public School Officials.* ED 044 829.

2. Gaddy, Dale. *Rights and Freedoms of Public School Students: Directions from the 1960's.* ED 048 666.

3. Phay, Robert E. *Suspension and Expulsion of Public School Students.* ED 048 672.

4. Buss, W. *Legal Aspects of Criminal Investigation in Public Schools.* ED 056 404.

5. Smith, George. *Legal Aspects of Student Records.* (in progress)

For copies of these documents ($3.50 each or $15.00 for the entire package of five documents) write:

National Organization on Legal Problems in Education
825 Western Avenue
Topeka, Kansas 66606